UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 29

TOWNE BUS, LLC

Employer

and Case No. 29-RC-10085

TRANSPORT WORKERS
OF AMERICA, AFL-CIO

Petitioner

and

AMALGAMATED TRANSIT
UNION, LOCAL 1181, AFL-CIO

Intervenor

SUPPLEMENTAL DECISION ON OBJECTIONS AND RECOMMENDATION FOR CERTIFICATION

On August 25, 2003,[1] the Transport Workers of America, AFL-CIO, herein called the Petitioner or TWU, filed a petition seeking to represent certain employees of Towne Bus, LLC, herein called the Employer. Thereafter, Amalgamated Transit Union, Local 1181, AFL-CIO, herein called the Intervenor or Local 1181, intervened. On October 30, the undersigned issued a Decision and Direction of Election. On November 26, an election by secret ballot was conducted among the employees in the following unit:

> All full-time and regular part-time drivers and matrons employed by the Employer at its facility located at 875 Waverly Avenue, Holtsville, New York, excluding all office clerical employees, guards and supervisors as defined in Section 2(11) of the Act.[2]

[1] All dates hereinafter are in 2003 unless otherwise indicated.
[2] Also eligible to vote were contingent, on-call or extra spare driver employees employed at the Employer's 875 Waverly Avenue, Holtsville, New York facility, who regularly averaged 4 hours or more per week for the last quarter prior to October 24, 2003.

The Tally of Ballots made available to the parties on December 23 showed the following results:

Approximate number of eligible voters	165
Number of void ballots	0
Number of votes cast for Petitioner	77
Number of votes cast for Intervenor	11
Number of votes cast against participating labor organization	30
Number of valid votes counted	118
Number of challenged ballots	47
Number of valid votes counted plus challenged ballots	165

Challenges are sufficient in number to affect the results of the election.

On December 24, the Acting Regional Director issued a Report on Challenges and Notice of Hearing. A hearing on the challenges was conducted on January 6, 2004. The Hearing Officer's Report, which issued on January 13, 2004, recommended that all the challenges be sustained and determined that a majority of the valid votes cast had been cast for the Petitioner.

On December 30, the Intervenor filed timely objections to conduct affecting the results of the election. The Intervenor objections allege, verbatim, as follows:

> 1. During the months of August, September, October and November 2003, the Employer threatened employees that they would not receive wage increases if they continued to support a union, or a union won the election.
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> 2. During the months of August, September, October and November 2003, the Employer threatened employees that they would lose accrued vacation if they continued to support a union, or a union won the election.
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> 3. During the months of August, September, October and November 2003, the Employer threatened employees that they would lose accrued sick leave days if they continued to support a union, or a union won the election.
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> 4. During the months of August, September, October and November 2003, the Employer threatened employees that they would lose the 3 for 5 holiday plan if they continued to support a union, or a union won the election.

5. During the months of August, September, October and November 2003, the Employer threatened employees that they would lose various benefits if they continued to support a union, or a union won the election.

6. During the months of August, September, October and November 2003, the Employer made various statements that were reasonably calculated to convey to the employees that if the Employer's Waverly Yard became unionized, the Employer would reject any request by the Union for continuation of their existing benefits, and that such benefits would therefore be jeopardized by voting for a union.

7. Prior to November 25, 2003, the Employer announced, and conducted, a raffle in the sum of $360.00, which would be equal to one year's union dues. In addition, in running the raffle, the Employer was in position [sic] to determine who voted and who did not vote.

8. During the months of August, September, October and November 2003, the Employer promised its employees that it would return all union dues to them, if they voted against the union.

9. During the months of August, September, October and November 2003, the Employer promised its employees the wages and benefits provided for in its collective bargaining agreement with Local 1181 whether a union won the election or not.

10. During the months of August, September, October and November 2003, the Employer, acting through its supervisors and other agents, interrogated its employees regarding their union membership, activities and sympathies.

11. During the months of August, September, October and November 2003, the Employer threatened its employees that if a union won the election, and there was a strike, they would be fired, not merely replaced.

12. On November 25, 2003, the date of the election, the employees were required to walk through a gauntlet of employees, in order to go to the voting area.

13. By the above acts and conducts [sic], the Employer improperly interfered with the free exercise of employee choice and destroyed the requisite laboratory conditions for the election.

Pursuant to Section 102.69 of the Board's Rules and Regulations, the undersigned caused an investigation to be conducted concerning the above-stated objections. During the investigation, the parties were afforded full opportunity to submit

evidence bearing on the issues. The undersigned also caused an independent investigation to be conducted. The investigation revealed the following:

The Employer, a domestic corporation, with its principal place of business located at 303 Sunnyside Boulevard, Plainview, New York, and a place of business located at 875 Waverly Avenue, Holtsville, New York, herein called the Waverly facility, provides transportation services to various entities including the Sachem Central School District located in Suffolk County, New York.

THE OBJECTIONS

OBJECTIONS NOS. 1 THROUGH 6 AND 8 THROUGH 11

In these objections, the Intervenor contends, essentially, that the Employer, during the critical period, interrogated employees; threatened employees with loss of wage increases, accrued vacation time, accrued sick leave days, a 3-for-5 holiday plan, other unspecified and existing benefits, and termination in the event of a strike; and promised employees that it would return union dues to them and continue to provide their current wages and benefits under its contract with Local 1181 if employees voted against the unions. The Petitioner asserts that these objections lack merit. The Employer generally denies the conduct attributed to it.

In support of these objections, the Intervenor provided the names of seven witnesses who will testify concerning the foregoing threats, promises and interrogation.

The independent investigation revealed that, on December 30, a Complaint issued in Case No. 29-CA-25813 alleging that, on or about May 1, June 6 and June 30, two supervisors of the Employer threatened employees (1) that they would not be hired because of their activities on behalf of the Petitioner and (2) conditioned employees' hire upon their membership in the Intervenor.

The Board has long held that in an election involving two competing unions in which one union has won the election decisively, the election will not be set aside because of employer misconduct affecting both unions equally. *Randall Rents of Indiana,* 327 NLRB 867 (1999) (employer paid employees a bonus before an election involving two competing unions). See also *Flat River Glass Co.,* 234 NLRB 1307 (19787) (employer posted new work rules during organizing drive of two competing unions); *Packerland Packing Co., Inc.,* 185 NLRB 653 (1970) (letter from the employer encouraging employees to "Vote No" opposes both unions); *Showell Poultry Co.,* 105 NLRB 580 (1953) (coercive speech by employer not ground for setting aside election where one union won).

The rule cited in the cases above applies here, because even assuming the Employer engaged in objectionable conduct, the Intervenor has provided no evidence that this conduct affected the Intervenor any differently than it did the Petitioner.[3] As noted above, the Hearing Officer recommended sustaining all 47 challenges, thus concluding that a majority of votes were cast for the Petitioner. Therefore, with the Tally standing at 77 votes for the Petitioner, 11 for the Intervenor and 30 for the Employer, the Petitioner is the decisive winner in the instant case.[4]

In light of the Petitioner's decisive victory and in the absence of any evidence that the Employer's conduct was disparately applied, I recommend that the Intervenor's objections Nos. 1 through 6 and 8 through 11 be overruled.

[3] With respect to Objection No. 8, I note that the Employer had no collective bargaining agreement with any union covering employees in the bargaining unit, as revealed by the Decision and Direction of Election in the underlying representation proceeding. Hence, there was no obligation for employees in the bargaining unit to pay dues to the Intervenor during the critical period. Indeed, the Intervenor's proffer fails to establish that any employee, in fact, paid dues to the Intervenor during the critical period.

[4] Also, I note that the Petitioner won the election despite other Employer misconduct aimed disparately at it, as alleged in the Complaint in Case No. 29-CA-25813.

OBJECTION NO. 7

In this objection, the Intervenor alleges that the Employer conducted a raffle, prior to the date of the election, for $360.00, or the equivalent of one year's union dues.[5] The Intervenor also contends that the process of running the raffle allowed the Employer to determine who voted and who did not. The Petitioner asserts that this objection lacks merit. The Employer denies the conduct attributed to it.

In support of its objection, the Intervenor provided the names of two witnesses who will testify that, prior to November 25, the day before the November 26 election, the Employer conducted a $360.00 raffle and, further, that by running the raffle "the Employer was able to determine who voted and who did not vote." The Intervenor provided no other evidence to show how the process of running the raffle allowed the Employer to determine who voted and who did not vote.[6]

In *Atlantic Limousine*, 331 NLRB 1025 (2000), the Board adopted a bright-line rule that employers and unions are prohibited from holding raffles if:

> (1) eligibility to participate in the raffle or win prizes is in any way tied to voting in the election or being at the election site on election day or (2) the raffle is conducted at any time during a period beginning 24 hours before the scheduled opening of the polls and ending with the closing of the polls. The term "conducting a raffle" includes the following: (1) announcing a raffle; (2) distributing raffle tickets; (3) identifying the raffle winners; and (4) awarding the raffle prizes. 331 at 1029.

However, the *Atlantic Limousine* rule does not apply to raffles conducted more than 24 hours prior to the election that are not aimed at encouraging employees to vote. Such raffles are analyzed by "whether or not they involve promises or grants of benefits that would improperly affect employee free choice; or whether they allow the employer to

[5] It is not clear either from the Intervenor's objections or its offer of proof which union's dues, or both, are the target of the raffle.
[6] It is also unclear what "vote" the Intervenor is referring to since it alleges that the raffle occurred prior to the date of the election.

identify employees who might or might not be sympathetic and thus to learn where to direct additional pressure or campaign efforts." Id. at fn. 13.

In the instant case, the Intervenor's evidence fails to satisfy the standard for an objectionable raffle under the rule in *Atlantic Limousine* since the Intervenor concedes that the raffle was announced and conducted prior to November 25 more than 24 hours prior to the election, and there is no evidence that participation was tied to voting in the election or being at the election site on the day of the election.

The Intervenor's evidence also fails to establish that the value of the raffle, $360.00,[7] amounted to a benefit that would improperly affect employee choice. *Atlantic Limousine,* supra at fn. 13. The Board has held that the raffle of a color television set valued at $350-$400 was not objectionable. *Tunica Mfg Co.*, 182 NLRB 729 (1970). Compare *E.A. Nord,* 276 NLRB 1418 (1985) (five $252 prizes, totaling $1260.00, are "so substantial" that the raffle constitutes objectionable raffle); *Grove Valve & Regulator Co.,* 262 NLRB 285 (1982); *Drilco,* 242 NLRB 20 (1979) (raffle winner had a choice of trip to Hawaii or Disneyland, found objectionable). In the instant case, the prize amounted to $360, an amount less than the value of prizes that the Board has found objectionable.

Finally, the Intervenor neither provides evidence nor even alleges that the raffle enabled the Employer to identify union sympathizers and thus tailor its campaign accordingly. *Atlantic Limousine,* supra at fn. 13. Although the Intervenor alleges in its objection that the Employer was able to tell who voted by running the raffle, the Intervenor's offer of proof fails to provide specific evidence about how the running of the raffle prior to the date of the election could have provided the Employer with knowledge

[7] Moreover, the independent investigation of the Employer's payroll records shows that the dues structure for Local 1181 is based on a percentage of any given employee's salary and therefore fluctuates. Thus, the Intervenor's reference to the amount of $360.00 does not appear to relate to its own dues amount.

of who voted during the election or who was more likely to vote. Its offer of proof merely reiterates the conclusory allegation contained in its objection.[8]

At any rate, as noted above, where objectionable employer conduct prior to an election is not particularly prejudicial to any union, the Board will not set aside an election where one union has won by a substantial margin. *Randall Rents of Indiana,* supra. In the instant case, the Petitioner won by the substantial margin of 66 votes, and there is no evidence that the raffle affected either union differently. The Intervenor provided insufficient evidence that the $360.00 raffle amount was a reference to its dues. The Intervenor's proffer failed to specify how the process of running the raffle revealed which employees would vote or, in fact, voted. Thus, even if the raffle constituted objectionable conduct, there is no evidence that it had a disparate effect on either union.

Based on the foregoing, I recommend that the Intervenor's Objection No. 7 be overruled.

OBJECTION NO. 12

In this objection, the Intervenor alleges that prospective voters were required to walk through a gauntlet of employees in order to enter the voting area. The Employer and Petitioner assert that this objection lacks merit.

In support of this objection, the Intervenor provided the names of three witnesses who would testify that "they were told by the Employer's Operations Director and Waverly Avenue Yard Terminal Manager to walk through the office to pick up their payroll check before they could vote. While walking through the office they told [sic] to vote "no union." The Intervenor provided no evidence to support its allegation

[8] Evidence submitted in support of objections must establish a prima facie case. Section 102.69(2) of the Board's Rules and Regulations. The Board requires an objecting party to submit "specific evidence of specific events from or about specific people" to meet the requirement of adequately supported objections. *NLRB v. Claxton Mfg. Co.,* 613 F2d 1364 (1980). It is not enough for an objecting party's proffer to merely imply or suggest that some form of prohibited conduct has occurred. *Cumberland Nursing Convalescent Center,* 248 NLRB 322 (1980).

concerning voters being required to pass through a gauntlet. Rather, it appears that under the guise of an offer of proof, the Intervenor is submitting an untimely objection alleging improper electioneering which is unrelated to its timely-filed objections.

In *Pepsi-Cola Bottling Co.,* 291 NLRB 578 (1988), prospective voters were forced to enter the polling area by walking past a "line formation" of "boisterous" prounion supporters. Id. at 579. The Board found that this conduct, compounded by other electioneering while employees waited in line to vote, warranted setting aside the election. The Intervenor provided no evidence that prospective voters in the instant case were exposed to such a gauntlet of other employees while on their way, or waiting in line, to vote. The Intervenor's offer of proof fails to indicate any "boisterous," crowded electioneering analogous to that in *Pepsi-Cola,* supra.

With respect to the Intervenor's evidence of improper electioneering (although not alleged in any objection), it is well established that the Board prohibits electioneering at or near the polls. *Boston Insulated Wire & Cable Co.,* 259 NLRB 1118 (1982), enfd., 703 F.2d 876 (5th Cir. 1983). However, the Board does not apply its no-electioneering rules to set aside elections whenever electioneering takes place at or near the polls, regardless of the circumstances. The factors considered by the Board include whether the conduct occurred within or near the polling place, the extent and nature of the alleged electioneering, whether it was conducted by a party to the election or by employees, and whether the electioneering was conducted within a designated "no electioneering" area or contrary to the instructions of the Board Agent conducting the election. *Boston Insulated Wire & Cable Co.*, supra at 1119. The rule established by the Board in *Milchem, Inc.*[9] does not apply to prospective voters unless the voters are in the

[9] 170 NLRB 362 (1968)

polling area or waiting in line to vote. *Blazes Broiler*, 274 NLRB 1031 (1985); *Westwood Horizons Hotel*, 270 NLRB 802 (1984); *Boston Insulated Wire & Cable Co.*, supra.

The Intervenor has failed to provide sufficient evidence to establish that the Employer engaged in impermissible electioneering at or near the polls. There is no evidence that the "vote no" remarks alleged by the Intervenor were made in the context of prolonged conversations in the no-electioneering area or while employees were waiting in line, as prohibited by the Board's rule in *Milchem,* supra. Moreover, even assuming the "vote no" remarks were made, they were not made within the polling place or in a designated "no electioneering area" or contrary to the instructions of the Board Agent conducting the election. Additionally, the Intervenor failed to provide evidence of who made the "vote no" statements. In any case, this remark is the kind of statement an employer is normally allowed to make as part of its anti-union campaign. In the absence of specific evidence about specific people, the Intervenor's proffer merely suggests that some form of prohibited conduct occurred. See *Cumberland Nursing,* supra. Thus, the Intervenor's offer of proof fails to establish that employees were told to "vote no" either in the context of a gauntlet or improper electioneering at or near the poll.

Moreover, the Intervenor's offer of proof is unrelated to its timely filed objection, and it has not established, or even claimed, that it recently learned of the evidence of improper electioneering. It is well established that a party cannot expand timely filed objections by furnishing evidence of unrelated objections unless it establishes, by clear and convincing proof, that the evidence is newly discovered and was previously unavailable. *Rhone-Poulenc, Inc.,* 271 NLRB 1008, enf. 789 F.2d 188 (1st Cir. 1986); *Burns Security Services, Inc.,* 256 NLRB 959 (1981); *John W. Galbreath,* 288 NLRB 876 (1988). To the extent that the Intervenor is attempting to expand its objections under the guise of an offer of proof, it is precluded from doing so where, as here, it has provided no evidence that its new allegation is based on newly discovered or previously unavailable

evidence. Moreover, even assuming that this additional allegation of objectionable conduct was related to the timely filed objections, as noted above, the evidence presented by the Intervenor is insufficient to warrant a hearing.

Finally, as discussed above, where objectionable employer conduct prior to an election is not particularly prejudicial to either competing union, the Board will not set aside an election where one union has won decisively. *Randall Rents of Indiana,* supra. In the instant case, the Petitioner won by a margin of 66 votes, and there is no evidence that the Employer's "vote no" statements had a disparate effect on either union.

Under the circumstances, I find that the evidence presented by the Intervenor is insufficient to warrant an inference that the Employer's conduct interfered with the exercise of employees' free choice. Accordingly, for all of the foregoing reasons, I recommend that the Intervenor's Objection No.12 be overruled.

OBJECTION NO. 13

In this omnibus objection, the Intervenor alleges that the Employer's conduct, as alleged above, along with other "acts" has interfered with the results of the election. The Petitioner asserts that this objection lacks merit. The Employer denies generally that it interfered with the free conduct of the election. The Intervenor provided no further evidence in support of this objection.

Inasmuch as the Intervenor did not provide any evidence in support of this objection which has not already been considered with respect to Objections Nos. 1 through 12 above, I recommend that the Intervenor's Objection No. 13 be overruled.

SUMMARY AND DETERMINATIONS

In summary, I have directed that the Intervenor's objections be overruled in their entirety. Accordingly, inasmuch as the Hearing Officer, as noted above, sustained the determinative challenged ballots in her Report on Challenges and found that a majority

of the valid votes cast has been cast for the Petitioner, I recommend that a Certification of Representative be issued in the event the Board adopts the Hearing Officer's recommendations concerning the challenged ballots.

RIGHT TO FILE FOR REVIEW

Under the provisions of Section 102.69 of the Board's Rules and Regulations, Series 8 as amended, a request for review of this Report may be filed with the National Labor Relations Board, addressed to the Executive Secretary, 1099 14th Street, N.W., Washington, D.C., 20570-0001.[10] The request for review must be received by the Board in Washington, D.C., on or before January 28, 2004.

Signed January 14, 2004, at Brooklyn, New York.

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Alvin Blyer
Regional Director, Region 29
National Labor Relations Board
One MetroTech Center North, 10th Floor
Brooklyn, New York New York 11201

[10] Under the provisions of Section 102.69(g) of the Board's Rules and Regulations, documentary evidence, including affidavits, which a party has timely submitted to the Regional Director in support of its objections and which are not included in the Regional Director's Supplemental Decision are not part of the record before the Board unless appended to the request for review or opposition thereto which the party files with the Board. Failure to append the submission to the Board copies of evidence timely submitted to the Regional Director and not included in the Regional Director's Supplemental Decision shall preclude a party from relying upon that evidence in any subsequent related unfair labor practice proceeding.